

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of)
)
Microft Systems) Docket No. FIFRA-93-H-03
International)
Holdings, S.A. and)
Alfred Waldner Company,)
)
Respondents)

O R D E R

On July 15, 1994, the undersigned issued a default order finding Respondents in default for failure to comply with a pre-hearing order of the ALJ and assessing a penalty of \$5,000, the amount demanded in the complaint for submitting false registration information in violation of § 12(a)(2)(Q) of FIFRA. The mentioned "Order on Default" was served by the Hearing Clerk on July 18, 1994.

Under date of August 5, 1994, Hofer-Real, business agent for Respondent, Alfred Waldner, filed a document entitled "Appeal For Temporary Stay Of Order On Default." The document recited that it was filed as an appeal in accordance with Rule 22.30.

The "appeal" stated that SRS International, registration agents for Microft, the initial registrant, no longer represented Waldner, and alleged that Alfred Waldner had attempted to research the issue underlying the preparation of an

affidavit, which Respondent had been directed to include in its pre-hearing exchange, as to whether Alfred Waldner Company had a pesticide product containing only permethrin as the active ingredient at the time of the registration at issue. It was further alleged that Mr. Waldner's research has been substantially delayed, because much of the necessary information was not in his possession or control, but, to the contrary, was in the possession or control of parties "inimical to the Alfred Waldner Company."

Hofer-Real stated the belief that Mr. Waldner was now very close to being able to prepare the requested affidavit and, on Waldner's behalf, requested a "stay of execution" of the Order on Default for a period not to exceed 15 business days. This period would allegedly enable Waldner to finalize the affidavit and "cure" his default.

Opposing the requested stay, Complainant pointed out that even if there were an adequate explanation for Respondent's failure to submit its pre-hearing exchange by the due date of July 16, 1993, such an explanation was overdue by at least 385 days. Complainant further pointed out that Respondent had ignored not only the requirement for a pre-hearing exchange, but other motions filed by Complainant, including its motion to amend the complaint, and had not responded to the motion for a default order. According to Complainant, Respondent perceives the default order to be merely a means of gaining Respondent's attention, rather than a sanction for failing to comply with the

ALJ's order. Complainant says that this notion should be put to rest by denying the motion.

Because the Appeal for a Temporary Stay of Order on Default recited that it was filed pursuant to Rule 22.30, the Hearing Clerk forwarded the "appeal" to the Environmental Appeals Board (EAB). By a memorandum, dated August 8, 1994, signed by its Clerk, the EAB returned the file indicating that the matter should be treated as a motion to reopen a hearing pursuant to Rule 22.28.

Rule 22.17(b) provides that a default order shall constitute the initial decision and shall be filed with the Regional Hearing Clerk [Hearing Clerk]. Once an initial decision is issued, the ALJ's (Presiding Officer's) jurisdiction in the matter normally terminates. In Re Asbestos Specialists, Inc., TSCA Appeal No. 92-3 (EAB, October 6, 1993) (slip opinion at 7, note 15). It follows that, if an initial decision is to be modified (except perhaps for errata), set aside, or stayed in any manner, it can only be accomplished through an appeal to the EAB in accordance with Rule 22.30 or through sua sponte review by the EAB pursuant to Rule 22.30(b). In this regard, Rule 22.29(a) includes default orders among decisions from which appeals to the EAB lie as a matter of right.

One exception to the rule that an ALJ loses jurisdiction over an initial decision once issued is a timely motion to reopen a hearing pursuant to Rule 22.28. Assuming that the provision has any application to cases like the instant matter

where a hearing has not been held, the stringent requirements for granting such a motion, which include a showing of good cause why the evidence now sought to be introduced was not adduced at the hearing, however, make it unlikely that Rule 22.28 will be of any utility in addressing default orders. This appears to be especially true under the circumstances present here.

A more promising avenue of possible relief for Waldner is Rule 22.17(d), which provides that "(f)or good cause shown, the Regional Administrator or the Presiding Officer, as appropriate, may set aside a default order." The EAB, having declined to regard Waldner's "Appeal for a Temporary Stay" as an appeal pursuant to Rule 22.30,* it is my determination to regard the mentioned pleading as a motion to set aside the default order. Granting such a motion requires a finding of "good cause." One prong of good cause seemingly is a showing of a good faith defense to the allegations in the complaint. A second prong is a showing of justification for failing to comply with the order of the ALJ or to respond to Complainant's motion for default.

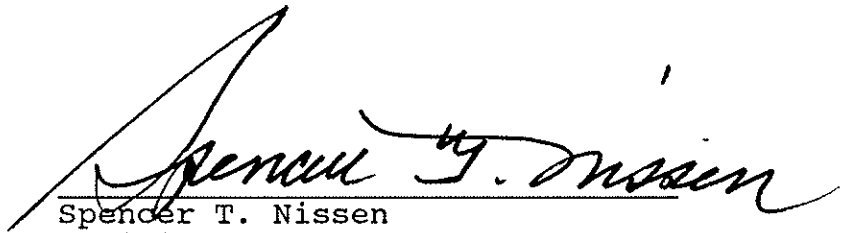
* The EAB's acceptance of the appeal under Rule 22.30 would automatically have stayed enforcement of the default order.

In order to determine whether good cause within the meaning of Rule 22.17(d) exists, Respondent, Waldner, is directed to submit, in addition to the affidavit he was previously directed to furnish, the following:

1. Identify the firm which employed Dr. Alfred Waldner at the time "Clean Kill Insecticide" was developed. See para. 3 of letter answer, dated January 19, 1993, filed by SRSI on behalf of Waldner.
2. Identify the parties and explain circumstances of information required for preparation of the referenced affidavit by Dr. Waldner being in the possession and control of parties "inimical to Alfred Waldner Company" as alleged in the Appeal for Temporary Stay.
3. Submit test data supporting the assertion that Insecticide 2000 Concentrate contains both permethrin and bioresmethrin and explain in detail the circumstances under which the sample was obtained. See page 7 of letter, dated January 6, 1993, from SRSI to Michael F. Wood, attached to answer.
4. Submit a statement of any circumstances which would justify or excuse the failure to furnish Dr. Waldner's affidavit and the failure to respond to Complainant's motion for default.

Respondent, Waldner, shall file its response to this order on or before September 23, 1994. Complainant may file a response to Waldner's submittal on or before October 13, 1994.

Dated this 10th day of August 1994.

A handwritten signature in cursive script, reading "Spencer T. Nissen". The signature is written in dark ink and is positioned above the printed name and title.

Spencer T. Nissen
Administrative Law Judge

cc:
EAB

CERTIFICATE OF SERVICE

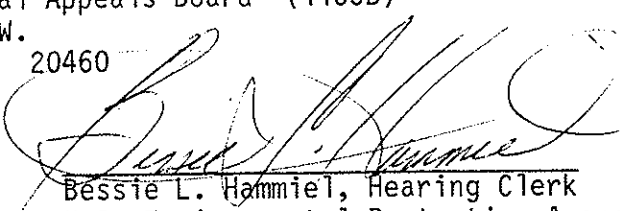
I do hereby certify that the foregoing Order was filed in re Microft Systems International; Docket No. FIFRA-93-H-03 and exact copies of the same were mailed to the following:

(Interoffice) Scott B. Garrison, Esq.
 Toxics Litigation Division (2245)
 U.S. Environmental Protection Agency
 401 M Street, S.W.
 Washington, D.C. 20460

(1st Class Mail) Mr. John A. Todhunter
 Science Regulatory International
 Suite 1000
 1625 K Street, N.W.
 Washington, D.C. 20006-1604

(1st Class Mail) Mr. Otmar Hofer
 Hofer Real Immobilien GesmbH
 Oberlaaerstrasse 21
 A-1100 Wien, Austria

(Interoffice) Environmental Appeals Board
 U.S. Environmental Appeals Board (1103B)
 401 M Street, S.W.
 Washington, D.C. 20460


Bessie L. Hammel, Hearing Clerk
U.S. Environmental Protection Agency
401 M Street, S.W.
Washington, D.C. 20460

Dated: August 10, 1994